BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation of the DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING v. SD CITY EVENT, INC., A California Corporation; AARON B. JOHNSON, as a Supervisor and an Individual; and TANYA O. BOLLMAN (aka JOHNSON), as a Supervisor and an Individual, Respondents. ANNETTE KAY HANDEVIDT, Complainant.	Case No. E-200405-D-1522-00-rse E-200405-D-1522-01-rs E-200405-D-1522-02-rs C 05-06-060 07-01-P ORDER NUNC PRO TUNC

The Fair Employment and Housing Commission hereby, *nunc pro tunc*, amends the Commission decision number of the attached final decision to 07-01-P.

DATED: April 4, 2007

FAIR EMPLOYMENT AND HOUSING COMMISSION

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ANN M. NOEL
Executive and Legal Affairs Secretary

BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation of the DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING v. SD CITY EVENT, INC., A California Corporation; AARON B. JOHNSON, as a Supervisor and an Individual; and TANYA O. BOLLMAN (aka JOHNSON), as a Supervisor and an Individual, Respondents.	Case No. E-200405-D-1522-00-rse E-200405-D-1522-01-rs E-200405-D-1522-02-rs C 05-06-060 06-14-P DECISION
ANNETTE KAY HANDEVIDT, Complainant.	

The Fair Employment and Housing Commission hereby adopts the attached Proposed Decision as the Commission's final decision in this matter but eliminates any monetary award for compensatory damages for emotional distress. The Commission further designates as precedential the section of the decision entitled Automatic Stay, commencing at page 8, paragraph 3, through page 9, paragraph 5, pursuant to Government Code section 12935, subdivision (h), and California Code of Regulations, Title 2, section 7435, subdivision (a).

The Commission also, *nunc pro tunc*, corrects the following typographical errors in the decision: page 3, paragraph 4, line 7, is amended to read "worked there three weeks;" page 5, paragraph 3, line 1, is amended to inset a space between "January" and "18;" and page 9, paragraph 4, line 7, is amended to insert a closed parenthesis after "444.)."

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523, Code of Civil Procedure section 1094.5, and California Code of Regulations, title 2, section 7437. Any petition for judicial review and

related papers shall be served on the Department, the Commission, respondents, and complainant.

DATED: March 27, 2007

GEORGE WOOLVERTON	LINDA NG
PATRICK ADAMS	CAROL FREEMAN
TAMIZA HOCKENHULL	

BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation of the DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING v. SD CITY EVENT, INC., A California Corporation; AARON B. JOHNSON, as a Supervisor and an Individual; and TANYA O. BOLLMAN (aka JOHNSON), as a Supervisor and an Individual, Respondents. ANNETTE KAY HANDEVIDT, Complainant.	Case No. E-200405-D-1522-00-rse E-200405-D-1522-01-rs E-200405-D-1522-02-rs C 05-06-060 PROPOSED DECISION

Administrative Law Judge Caroline L. Hunt heard this matter on behalf of the Fair Employment and Housing Commission on September 6 and 7, 2006, in San Diego, California, and on September 29, 2006, by telephone. Paul R. Ramsey, Chief Counsel, and Erin Koch-Goodman, Staff Counsel, represented the Department of Fair Employment and Housing (DFEH). Complainant Annette Handevidt attended the hearing. No representative for respondent SD City Event, Inc., appeared at hearing. Respondent Tanya Johnson appeared as the non-attorney representative for the individual respondents, Tanya and Aaron Johnson.

After receipt of the hearing transcripts on September 26 and October 17, 2006, the Commission received the DFEH's timely filed closing brief on October 20, 2006. On October 30, 2006, the Commission received written notification from Tanya Johnson that the individual respondents elected not to file a closing brief, and the matter was deemed submitted on that date.

After consideration of the entire record, the administrative law judge makes the following findings of fact, determination of issues, and order.

FINDINGS OF FACT

1. On March 14, 2005, Annette Kay Handevidt (complainant or Handevidt) filed a written, verified complaint with the DFEH against San Diego [sic] City Event, Inc. The complaint alleged that, on January 24, 2005, complainant was terminated from her position as Human Resources Manager in retaliation for opposing unlawful sex discrimination, when she reported to the company's president, (then known as) Tanya Bollmann, that a male supervisor believed that the company's chairman, Aaron Johnson, was treating a female supervisor "preferentially." The complaint further alleged that the retaliatory conduct violated the Fair Employment and Housing Act, Government Code section 12900, et seq. (FEHA or the Act).

2. On March 10, 2006, complainant filed two further written, verified DFEH complaints against Aaron Johnson and Tanya O. Bollman [sic], each as individuals, and otherwise stating the same allegations as those stated in the original complaint.

3. The DFEH is an administrative agency empowered to issue accusations under Government Code section 12930, subdivision (h). On March 10, 2006, Suzanne M. Ambrose, in her official capacity as Director of the DFEH, issued an accusation against SD City Event, Inc., (respondent SD City Event), Aaron Johnson, as an individual, and Tanya Bollman [sic], as an individual, alleging that, on January 24, 2005, respondents retaliated against complainant for engaging in protected activity by terminating her employment, in violation of Government Code section 12940, subdivision (h).

4. On March 18, 2006, the DFEH filed a first amended accusation, amending the spelling of "Tanya Bollmann," adding some factual allegations, and otherwise stating the same allegations as in the original accusation.

5. At all times relevant, respondent SD City Event was a California corporation also doing business under the names City Events, Inc. and City Events. SD City Event maintained offices at 7875 Convoy Court, Suite 3, San Diego, CA, 92111 and 8766 Complex Drive, San Diego, CA, 92123. Respondent SD City Event's President and Chief Executive Officer was Aaron Johnson, and Vice President and Chief Financial Officer was Tanya Bollmann. SD City Event employed a human resources manager, five or six office staff, including schedulers and account executives, a business development manager and a training coordinator. SD City Event also employed off-site field supervisors who oversaw the part-time security guards who were engaged by the company, as needed, to work events. Respondent SD City Event was an employer within the meaning of Government Code sections 12926, subdivision (d), and 12940, subdivision (h).

6. On January 17, 2001, complainant started working for SD City Event as a security guard. She was subsequently promoted to work as a scheduler, then as an account executive. Effective April 17, 2004, SD City Event promoted complainant to the position of Human Resources Manager.

7. As Human Resources Manager, complainant was responsible for maintaining and updating SD City Event's policy manual, employee personnel handbook, employee records and benefits, overseeing payroll, complying with state laws and legal required postings, and attending meetings as part of the company's management team. As Human Resources Manager, complainant was at first paid a salary of $2,600 per month. She received several raises, and by January 2005, was paid the rate of $2,860.10 per month.

8. In 2004, Aaron Johnson and Tanya Bollmann were romantically involved with one another, and in the fall of 2004, Tanya Bollmann became pregnant with their child. They subsequently married, on a date not established in the record.[1]

9. From January 2004 to January 2005, Melissa Knight worked at SD City Event as a scheduler. As part of her duties, Knight answered telephone inquiries and complaints by field supervisors and security officers. Knight generally referred these inquiries or complaints to the appropriate supervisor.

10. In December 2004 and January 2005, SD City Event had problems meeting their payroll. Effective December 31, 2004, the company's group health insurance, including complainant's, was cancelled, due to insufficient funds to cover a payment. At some point in January 2005, the Internal Revenue Service (IRS) placed a lien on the company's bank accounts and accounts receivables. Various employees complained to Melissa Knight that their paychecks had "bounced." Cheryl Thomas, who started with SD City Event in about January 2005, and worked their three weeks, received complaints about "bad" payroll checks.

11. On January 14, 2005, Knight received a telephone call from a female field supervisor with a different type of complaint--that Aaron Johnson had been seen at the Convention Center with a security guard, emerging from a secluded area "adjusting their clothing." (The name of the field supervisor who called Melissa Knight was not established in the record.) Knight decided that this was gossip that needed to be "nip[ped] in the bud" and she reported the matter to Handevidt.

12. On January 14, 2005, Handevidt met with Tanya Johnson, telling her that, while she was sorry to be the one to have to tell her, she had been told that a coworker had reported that Aaron Johnson might be having an affair with a female employee, Robin Toole.

13. Tanya Johnson responding calmly, telling Handevidt not to worry, assuring her that she had done the right thing, and that "everything would be alright." Handevidt was comforted by Tanya Johnson's response.

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[1] Tanya Bollmann is hereinafter referred to by her married name, Tanya Johnson.

14. Tanya Johnson immediately called Aaron Johnson on his cell phone, telling him that she had just been informed by Handevidt that he might be having an affair with a coworker. Aaron Johnson was outraged. He asked to speak to Handevidt, saying, "Why didn't you investigate this first?" Without giving complainant an opportunity to explain, he said, "Just wait until I get back to the office--heads are going to roll."

15. On the next business day, Tuesday, January 18, 2005, Aaron Johnson wrote a memorandum to Handevidt, stating that he was "appalled and outraged" that she had relayed "unsubstantiated information" to Tanya Johnson, who was seven months pregnant at the time. He also wrote, *inter alia*,

> First of all, you were way out of line to bring hearsay information into Tanya and our personal lives, especially as she is approximately (7) months pregnant. What reason did you have besides stupidity to address her rather than me?
>
> You continue to make decisions NOT in the best interest of the company and as our HR Manager.
>
> You are very lucky that you are not terminated at this very point.
>
> However, I must advise you that you will no longer be part of Senior Management.
>
> I cannot and will not have individuals jumping to conclusions prior to thoroughly investigating the facts to jeopardize my business and ultimately my family and unborn child.

16. That same day, January 18, 2005, Handevidt emailed a response to Aaron Johnson's memorandum, stating that she believed that she had acted in the best interests of SD City Event, and that:

> Employees were making allegations of preferntial [sic] tratment [sic]… Preferential treatment in the workplace is both a Federal and State legal cause of action. I felt I would be remiss in my duties to [SD City Event] to keep this to myself.

Handevidt also stated in her email that she had wanted to raise the matter in a meeting, but that the scheduled management meetings had been cancelled. She further wrote that she reported the matter because she regarded the complaint a "serious legal allegation against the company" and considered it to be part of her duties to apprise management. She also stated:

> …I'm aware that these sorts of things have circulated before and really didn't believe them now. I sincerely didn't do this to be vindictive or destructive. I know now that the way I communicated it may have come across in a manner that I didn't intend. I am sorry if you perceived that I in fact believed these rumors.

17. Neither Aaron nor Tanya Johnson responded to Handevidt's email.

18. In the week of about January18, 2005, Cheryl Thomas resigned from SD City Event because of problems getting paid.

19. On January 24, 2005, when Handevidt arrived at work, Frank Wolfgramm asked her to step into the training room. Scarlett Sarnacki was present.[2] Wolfgramm told Handevidt that her employment was terminated effective that day and that her personal effects had been packed up. Complainant collected her belongings and left the premises.

20. SD City Event did not subsequently fill the position of Human Resources Manager.

21. At some point in January 2005, SD City Event also terminated the employment of four additional full-time employees, including two account executives, Shawna Allison and Gidget Pelekai. The names or job titles of the other two terminated employees were not established in the record.

22. As a result of being terminated from her position at SD City Event, complainant felt "horrible," at times an "emotional wreck." She tried to second-guess her reporting of the suspected affair and alleged preferential treatment to evaluate whether she could have handled things better and changed the outcome. She also felt some relief, however, because she had experienced a lot of stress working at SD City Event and in particular, in the last few weeks, when she was anticipating that she might lose her job.

23. After her employment at SD City Event was terminated, complainant worried about finding another position. She at times doubted herself and her abilities. She was unsure whether she was qualified to work as a Human Resources Manager. The loss of her job led to financial difficulties for complainant and her husband Gregory Handevidt. He was a fairly new attorney, still working to build a practice, and the couple had relied on complainant's steady income.

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[2] Neither Wolfgramm nor Sarnacki testified at hearing nor were their job titles or duties established.

Complainant's Job Search

24. After SD City Event terminated her employment, complainant applied for positions with temporary employment agencies, responded to job advertisements and sent out a number of copies of her résumé.

25. On March 17, 2005, complainant found work through a temporary agency, TEG Staffing, Inc., which placed her in a temporary position at LPL Financial Services. Complainant worked there for five months, earning $12,354.05, or $2,470.80 per month.

26. In July 2005, complainant and her husband Greg filed a petition in bankruptcy. They subsequently received a discharge from the Bankruptcy Court.

27. On August 1, 2005, LPL Financial Services hired complainant as a permanent employee, at a higher rate than she had earned at SD City Event.

Policies and Training

28. At all times relevant, SD City Event maintained a written policy against discrimination and unlawful harassment, including sexual harassment. Under the company's written complaint procedure, employees with complaints about discrimination or harassment were to report their concerns to their immediate supervisor or the Human Resources Manager. The policy stated that employees could "raise concerns and make reports without fear of reprisal."

29. SD City Event also conducted trainings on the prevention of sexual harassment. At these trainings, employees were told that if they had any complaints about harassment, they were to report them to the Human Resources Manager.

SD City Event's Bankruptcy Proceedings

30. On March 29, 2006, SD City Event filed for protection under Chapter 11 of the United States Bankruptcy Code (Bankruptcy Code). During the Chapter 11 proceeding, SD City Event operated its business as a debtor-in-possession and estimated its debts as exceeding $1,000,000.

31. On May 23, 2006, SD City Event voluntarily converted its bankruptcy case to a Chapter 7 filing under the Bankruptcy Code (case no. 06-00591-H7 [Bky. S.D.Ca1.]). Gregory A. Akers was appointed the Chapter 7 Trustee for SD City Event.

32. Based on Gregory Aker's declaration, SD City Event's assets were "minimal," totaling less than $10,000. As a result, Akers considered it unlikely that any claims beyond the costs of bankruptcy administration, taxes, wages, rent, and attorney's fees and costs to be determined by the Bankruptcy Judge, would be paid.

DETERMINATION OF ISSUES

Disclosure Hearing

After the conclusion of the evidentiary hearing in this case, the DFEH notified the Commission that its Staff Counsel Erin Koch-Goodman had recently learned that her mother had been previously acquainted with the judge. On September 19, 2006, Koch-Goodman submitted a letter to the Commission revealing her mother's name as Sara Shapiro. The Commission promptly forwarded a copy of that letter to respondents. (Cal. Code Regs., tit. 2, § 7420.)

On September 29, 2006, the undersigned convened a disclosure hearing to be attended by the parties, by telephone. (Gov. Code, § 11475.20; Cal. Code Jud. Ethics, canon 3(E)(2).) Both Paul Ramsey and Erin Koch-Goodman appeared for DFEH, and Tanya Johnson appeared for the individual respondents.

At the hearing, the undersigned judge informed the parties that she had been acquainted with Ms. Shapiro some five or six years earlier, in Ms. Shapiro's professional capacity as a physical therapist and on one social occasion--a dinner. There had been no contact for more than five years.

Government Code section 11425.40, subdivision (a), provides that an administrative law judge presiding in a case is "subject to disqualification for bias, prejudice, or interest in the proceeding." The California Code of Judicial Ethics, canon 3(E)(2), provides for disclosure, on the record, of "information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no actual basis for the disqualification."

Prior acquaintance between counsel's relative and the judge is not sufficient for disqualification without a showing of bias or prejudice. As the court noted in *United Farm Workers of America v. Super. Ct* (1985) 170 Cal.App.3d 97, 100, "[ ] the proper performance of judicial duties does not require a judge to withdraw from society and live an ascetic, antiseptic and socially sterile life. Judicial responsibility does not require shrinking every time an advocate asserts the objective and fair judge appears to be biased. The duty of a judge to sit where not disqualified is equally as strong as the duty not to sit when disqualified. . . ."

Under the ethical rules guiding the administrative process, prior acquaintance between counsel's mother and the judge, first learned of after the hearing was concluded, and where the last contact was over five years ago, does not affect the ability of this judge to decide this case fairly and impartially, without bias or prejudice. (Gov. Code, §§ 11425.40, subd. (a); 11475.20; Cal. Code Jud. Ethics, canon 3(E)(2).) Nor will it influence the judgment in this case. (Cal. Code Jud. Ethics, canon 2(E)(2).) Moreover, the disclosure on the record at the September 29, 2006 hearing satisfies the mandates of California Code of

Judicial Ethics, canon 3(E)(2), to disclose the information and permit the parties an opportunity to move for disqualification. At the hearing, the individual respondents' representative voiced no objection, in light of the disclosure, to the undersigned determining this case.

Accordingly, the undersigned administrative law judge moves to a determination of the legal effect of the bankruptcy filed by respondent SD City Event.

Automatic Stay

As noted in the findings of fact, SD City Event filed a Chapter 11 bankruptcy petition about a week after the DFEH filed the administrative accusation with the Commission in this matter. Respondent later voluntarily converted its bankruptcy to a Chapter 7 proceeding, and the Chapter 7 Trustee, Gregory Akers, was appointed. At hearing, the administrative law judge took official notice of the declaration filed in this proceeding by Chapter 7 Trustee Akers, concerning the status of SD City Event's bankruptcy. (Cal. Code Regs., tit. 2, § 7431.)

Title 11 U.S.C. section 362, subdivision (a), provides that the filing of a bankruptcy petition operates as an automatic stay of proceedings against the debtor. (11 U.S.C. § 362, subd. (a).) The Chapter 7 Trustee asserts that the Bankruptcy Code's "automatic stay imposed by 11 U.S.C. section 362(a) is in effect with respect to [SD City Event's] bankruptcy case." The DFEH argues, however, that this administrative proceeding is exempt from the automatic stay under the exception provided at 11 U.S.C. section 362, subdivision (b) (4), as an exercise of the state's police power "for the protection of the welfare, health, and peace of the people of the State of California."

Title 11 U.S.C. section 362, subdivision (b) (4), provides that the filing of a bankruptcy petition does not operate as a stay of:

> (4) …the commencement or continuation of an action or proceeding by a governmental unit…to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power.

In support of its position that the instant action falls within the above exception to the automatic stay, the DFEH relies on *EEOC v. McLean Trucking Company* (3rd Cir. 1987) 834 F.2d 398, 402 [*McLean*]; *EEOC v. The Rath Packing Company* (1986) 787 F.2d 318 [*Rath*]; and *In re Pincombe* (2000) 256 B.R. 774, 780-781. In these cases, the courts exempted actions brought by the EEOC (*McLean* and *Rath* [both Title VII employment discrimination cases]) and a state Department of Human Rights (*In re Pincombe*, *supra,* 256 B.R. at pp. 780-781 [an Illinois administrative action charging sex discrimination]), from the

Bankruptcy Code's automatic stay provisions, by applying the "police or regulatory power" exception under section 362, subdivision (b) (4).

The applicability of the police or regulatory power exception to the automatic stay to a DFEH administrative action before the Commission is an issue of first impression. The cases cited by DFEH can be seen, however, in the context of the development of national case law applying the "police or regulatory power" exception to permit the enforcement of civil rights by both federal and state agencies. (See also, for example, *EEOC v. Hall's Motor Transit Co.* (3rd Cir. 1986) 789 F.2d 1011, enforcing federal employment discrimination laws; *In re Mohawk* (1999) 239 B.R. 1, 9, permitting the Massachusetts Commission Against Discrimination to enter injunctive relief and assess back pay damages; and *EEOC v. Consolidated Freightways Corp. of Delaware* (2004) 312 B.R. 657, 659, finding that the EEOC was not barred from proceeding as the automatic stay did not apply, and declining to issue a discretionary stay.) Moreover, in *Keitel v. Heubel* (2002) 103 Cal.App.4th 324, 333, the Court of Appeal for the First District applied the police or regulatory power exception to California courts, holding that the automatic stay did not bar the court's authority to impose sanctions.

California has a strong public policy against discrimination and harassment, enunciated unambiguously in the FEHA. (Gov. Code, § 12920.) The Act, which both establishes and governs the operations of the DFEH and Commission, sets out California's public policy "to protect and safeguard the right of all persons to seek, obtain, and hold employment without discrimination or abridgment." (Gov. Code, §§ 12920, 12930, 12935.) The FEHA is expressly "deemed an exercise of the police power of the state for the protection of the welfare, health, and peace of the people of this state." (Gov. Code, § 12920.)

In the present proceeding, the DFEH asserts the public right to a discrimination and retaliation-free workplace, as protected under the Act. The DFEH acts as a public prosecutor testing a public right. (*State Personnel Bd. v. Fair Empl. & Hous. Com.* (1985) 39 Cal.3d 422, 444. In this administrative proceeding, the DFEH represents the interests of the state to effectuate California's declared public policy. (*Dept. Fair Empl. & Hous. v. American Airlines, Inc.* (Mar. 7, 1991) No. 91-06, FEHC Precedential Decs. 1990-91, CEB 7, p. 24 [1991 WL 370086 (Cal.F.E.H.C.)].)

Accordingly, this decision finds that the police or regulatory power exception to the automatic stay applies to the DFEH's action against SD City Event. Thus, the Commission may proceed to adjudicate liability against SD City Event in this case.

Liability

The DFEH asserts that both the corporate and individual respondents are liable for retaliating against complainant by terminating her employment for "opposing practices she believed were forbidden" by the FEHA, in violation of Government Code section 12940, subdivision (h).

Government Code section 12940, subdivision (h), makes it unlawful for an employer "to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding" brought under the FEHA. (Gov. Code, § 12940, subd. (h); Cal. Code Regs., tit. 2, § 7287.8.)

To establish retaliation under the Act, the DFEH must show that complainant engaged in a "protected activity," that respondents subjected her to an adverse employment action, and that a causal link existed between complainant's protected activity and the adverse employment action. (*Yanowitz v. L'Oréal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 [*Yanowitz*]; and *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476.) The DFEH has the initial burden to establish respondents' knowledge that complainant engaged in a protected activity and the proximity in time between the protected action and the allegedly retaliatory employment decision. (*Morgan v. Regents of Univ. of California* (2000) 88 Cal.App.4th 52, 69.) If respondents articulate a legitimate non-retaliatory reason for the adverse employment action, the burden shifts back to the DFEH to prove that the proffered reason was merely a pretext for an illegal adverse action. (*Yanowitz, supra,* 36 Cal.4th at p. 1042; *Flait v. North American Watch Corp., supra,* 3 Cal.App.4th at p. 476; *Gemini v. Fair Empl. & Hous. Com.* (2004) 122 Cal.App.4th 1004, 1018.)

A. Whether Complainant Engaged in a Protected Activity

The DFEH argues that complainant's report of an employee's concerns about alleged "preferential treatment" toward a particular employee, Robin Toole, based on a suspected sexual affair between the company president and Ms. Toole, constituted a "protected activity" for the purposes of the FEHA's retaliation provisions.

An employee's conduct may constitute protected activity "not only when the employee opposes conduct that ultimately is determined to be unlawfully discriminatory under the FEHA, but also when the employee opposes conduct that the employee reasonably and in good faith believes to be discriminatory, whether or not the challenged conduct is ultimately found to violate the FEHA." (*Yanowitz, supra,* 36 Cal.4th at p. 1043; *Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 474; and *Flait v. North American Watch Corp., supra,* 3 Cal.App.4th at p. 477.) In accord are the Commission's regulations, which define "protected activity" to include an employee's "[o]pposing employment practices which an individual reasonably believes to exist and believes to be a violation of the Act." (Cal. Code Regs., tit. 2, § 7287.8, subd. (a)(1)(C).)

DFEH witness Melissa Knight testified that, on January 14, 2005, she informed complainant that an unidentified female field supervisor had complained that Aaron Johnson was having a sexual affair with an employee named Robin Toole. No details of specific instances of preferential treatment were identified. Complainant testified that she informed Tanya Johnson that same day of the concerns relayed by Knight. Complainant later followed

up with her email of January 18, 2005, stating that she believed "[preferential treatment in the workplace [to be] both a Federal and State legal cause of action."[3]

On the issue of what Knight reported to complainant about the call and, in turn, what complainant told Tanya Johnson, there are some discrepancies. Knight testified that the unidentified caller was female, while complainant identified the caller as male. Also, while complainant testified that she relayed to Tanya Johnson, on January 14, 2005, very specific details of instances of preferential treatment, Knight did not mention any of these details in her testimony.

Tanya Johnson disputed complainant's account of their encounter of January 14, 2005, testifying that, when complainant came to her office, complainant said that Aaron Johnson "may be having an affair with a coworker," without mentioning sexual harassment or instances of preferential treatment. On this particular point, Tanya Johnson's testimony is credited over complainant's hearing testimony, not only because of the character and nature of Tanya Johnson's testimony and demeanor on the stand, but also because it is both plausible under the circumstances, and more consistent with Knight's report.[4] Thus, this decision finds that in complainant's initial report to Tanya Johnson, complainant disclosed the suspected affair, without itemizing details of instances of alleged preferential treatment to Robin Toole.

While merely reporting "office gossip" about a suspected affair may not be sufficient to be considered protected activity (see *Miller, supra,* at p. 471), once complainant sent her email of January 18, 2005, in which she expressly conveyed concerns to management that employees had complained about preferential treatment as a result of the alleged Johnson/Toole affair, and that "[p]referential treatment in the workplace is both a Federal and State cause of action," complainant's email can be seen as protected within the anti-retaliation provisions of the FEHA. (Gov. Code, § 12940, Cal. Code Regs., tit. 2, § 7287.8, subd. (a)(1)(C), *Yanowitz, supra,* 36 Cal.4th at p. 1043.)

Accordingly, this decision finds that complainant's January 18, 2005 email was "protected activity" within the meaning of the FEHA.

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[3] At hearing, the administrative law judge took under submission the admissibility of the testimony about the contents of the unidentified caller's statements. The DFEH offered several theories of admissibility, including that the statements were offered as non-hearsay, to show effect on the listener, and as a present sense impression exception to the hearsay rule. This decision finds that the statements are admissible for the non-hearsay purpose to establish that the statements were made, that the employer was on notice and as "operative facts" of the underlying alleged discrimination reported by complainant. The statements were not offered to prove the truth of the matter asserted, that Aaron Johnson and Robin Toole were actually carrying on a sexual affair. (See *Stearns v. Fair Empl. Practices Com.* (1971) 6 Cal.3d 205; *Bihun v AT&T* (1993) 13 Cal.App.4th 976, 988-989.)

[4] In assessing the credibility of a witness' testimony at hearing, it is appropriate to consider the manner and character of the testimony, as well as his or her demeanor. (Evidence Code section 780; *Kilstrom v. Bronnenberg* (1952) 110 Cal.App.2d 62, "[t]he weight and credibility of testimony is affected, not only by other directly contradictory evidence, but also by pertinent circumstances and witnesses' demeanor.")

B. Causal Connection Between Adverse Employment Action and Protected Activity.

The DFEH asserts that SD City Event's termination of complainant's employment was an adverse action causally related to her protected activity.[5] The record established that complainant's employment was terminated by SD City Event on January 24, 2005, 10 days after complainant's initial report and six days after her email. This notice to respondent and proximity in time is sufficient to raise the inference that there was a causal connection between complainant's protected activity and the termination of her employment. (*Morgan v. Regents of Univ. of California*, *supra*, 88 Cal.App.4th at p. 69; *Gemini v. Fair Empl. & Hous. Com.*, *supra*, 122 Cal.App.4th at p. 1020; and *Flait*, *supra*, 3 Cal.App.4th at p. 476.)

C. Respondent SD City Event's Liability

At hearing, SD City Event was in Chapter 7 bankruptcy and their prior attorneys had substituted out prior to the hearing, thus no representative for the corporation appeared.

The only evidence offered by the corporation was the declaration filed by the bankruptcy Trustee, establishing that the corporation had no assets.[6]

Since SD City Event did not contest the allegations of unlawful retaliation and proffered no defense, this decision finds SD City Event in violation of Government Code section 12940, subdivision (h).

D. Individual Respondents' Liability

1. Whether Individuals Can Be Held Personally Liable for Retaliation Under the FEHA

The DFEH alleges that both respondents Aaron and Tanya Johnson can be held personally liable for retaliation against complainant under Government Code section 12940, subdivision (h), because they are supervisors and "persons" within the meaning of that subsection. The DFEH cites *Page v. Super. Ct.* (1995) 31 Cal.App.4th 1206, 1213; *Walrath v. Sprinkel* (2002) 99 Cal.App.4th 1237, 1240-1241; and *Winarto v. Toshiba America Electronics Components* (9th Cir. 2001) 274 F.3d 1276, 1288.

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5 The DFEH asserts that complainant was "frozen out" of management team meetings. The record, however, does not establish this. To the contrary, complainant notes in her memorandum of January 18, 2005, that the meetings had already been cancelled.

6 Had the corporation appeared, it could presumably have asserted a defense to the charge of retaliation similar to that offered by the individual respondents (as discussed below) to establish a legitimate, non-retaliatory reason for the termination of complainant's employment. The fact remains, however, it did not do so. And Tanya Johnson, the representative for the individual respondents, made it clear at hearing that she did not represent SD City Event.

The California appellate courts have held that individual supervisors may be held liable for retaliation under the FEHA. In *Page v. Super. Ct.*, *supra*, 31 Cal.App.4th at pp. 1213, 1217, the Court of Appeal for the Third District granted a writ of mandate vacating the lower court's sustaining of a demurrer without leave to amend on the basis that a supervisor is a "person" who may be held personally liable for sexual harassment and retaliation under the FEHA. In *Walrath v. Sprinkel*, *supra*, 99 Cal.App.4th at pp. 1240-1241, the Court of Appeal for the First District reversed the trial court's granting of summary judgment in favor of the individual supervisor, the company president, where plaintiff alleged that he was personally liable for retaliation under the FEHA. In accord is *Taylor v. City of Los Angeles Dept. of Water & Power* (2006) 144 Cal.App.4th 1216, recently decided by the Court of Appeal for the Second District, reversing the trial court's sustaining of defendants' general demurrer, and holding that a supervisor may be personally liable for retaliation under the FEHA. (*Id.*, at p. 1237.) Thus, a supervisor may be held personally liability for retaliation under the FEHA.

2. Whether Respondents Tanya Johnson and Aaron Johnson Are Personally Liable for Retaliation

In order to establish personal liability, the DFEH needs to show that Tanya and/or Aaron Johnson terminated complainant in retaliation for her protected activity. In their defense, Tanya and Aaron Johnson assert that the decision to terminate complainant was due to the financial difficulties they were facing, particularly after the IRS levied their accounts.

The DFEH introduced Aaron Johnson's memorandum of January 18, 2005, in which he indicated that he was "appalled and outraged" at complainant for telling Tanya Johnson that he might be having an affair. He also excoriated complainant for her lack of judgment in going to Tanya Johnson with such "unsubstantiated information" when Tanya Johnson was seven months pregnant. He said he was removing her from the senior management team. This decision finds that this memorandum was the irate response of a protective, prospective father accused of having an affair. The record does not support that the memorandum itself was retaliatory because the protected activity--complainant's email--had not yet been written.

In the case of Tanya Johnson, complainant testified that Tanya Johnson was calm and comforting in her response to complainant when she reported the alleged affair. And the record did not establish any further communications between either Aaron or Tanya Johnson and complainant, after she sent her email on January 18, 2005. Complainant did not testify to any reason being given to her at the time of the termination. And Frank Wolfgramm, who met with complainant to terminate her employment on January 24, 2005, and was listed as a DFEH witness, did not testify at hearing to shed light on this issue.

On the issue of the reason for complainant's termination, Tanya Johnson testified at hearing that the decision was made because of the economic downtown experienced by the company and the serious financial difficulties they faced. She credibly testified that they were unable to meet their payroll obligations, particularly in January 2005, when the IRS imposed tax levies on their accounts. She further testified that, as a result of the financial

problems, four full-time employees, including two account executives, Shawna Allison and Gidget Pelekai, were terminated or "laid off," and that complainant's position of Human Relations Manager was eliminated. The record established that the position was not subsequently filled.

The DFEH argues that the Johnsons' defense is unsupported by any evidence. Tanya Johnson's testimony concerning the business's economic downturn and payroll problems at SD City Event, however, was corroborated by several DFEH witnesses. Melissa Knight testified that she had received complaints from employees that their paychecks had "bounced." Complainant and her husband Greg both testified that the health insurance previously provided by her employer was cancelled, effective December 31, 2004, after SD City Events lost its group coverage due to insufficient funds to cover a payment. Cheryl Thomas, who worked at SD City Event for three weeks in January 2005, testified about several "bad" payroll checks at the company, and that she quit her job in mid-January 2005 because she did not get paid. Given this corroborating testimony, and the fact that Tanya Johnson provided the names of two other employees who were "laid off" in the same time period, this decision credits Tanya Johnson's testimony about the financial difficulties that she and Aaron Johnson were experiencing in January 2005.

Thus, the individual respondents have proffered a legitimate non-retaliatory reason for complainant's termination. The burden is on the DFEH to establish that this asserted reason was merely pretext for intentional retaliation. (*Yanowitz, supra*, 36 Cal.4th at p. 1042; *Flait v. North American Watch Corp., supra,* 3 Cal.App.4th at p. 476; *Gemini v. Fair Empl. & Hous. Com.*, supra, 122 Cal.App.4th at p. 1018.) This decision finds that, based on this record, the DFEH did not rebut the individual respondents' defense to prove that it was mere pretext.

Accordingly, this decision finds that the DFEH did not prove that the individual respondents are personally liable for violating Government Code section 12940, subdivision (h). Thus, the accusation against Tanya and Aaron Johnson shall be dismissed.

Remedies

A. Make-Whole Relief

Having established that respondent SD City Event was found in violation of Government Code section 12940, subdivision (h), the DFEH is entitled to an order of whatever forms of relief are necessary to make complainant whole for any loss or injury she suffered as a result. The DFEH must demonstrate the nature and extent of the resultant injury, and respondent has the burden to demonstrate any bar or excuse it asserts to any part of these remedies. (Gov. Code, § 12970, subd. (a); Cal. Code Regs., tit. 2, § 7286.9; *Dept. Fair Empl. & Hous. v. Madera County* (Apr. 26, 1990) No. 90-03, FEHC Precedential Decs. 1990-91, CEB 1 at p. 34 [1990 WL 312871 (Cal.F.E.H.C.)].)

The DFEH requested an award of complainant's lost wages, out-of-pocket damages, actual damages for emotional distress, an administrative fine, affirmative relief and such other relief as the Commission deems appropriate.

1. Back Pay

The Department asserts that complainant is entitled to lost wages calculated for the period following her last day of work on January 24, 2005, until she found permanent higher paying work commencing August 1, 2005.

Complainant's lost wages from January 25, 2005, to March 16, 2005, calculated at the rate of $2,860.12 per month ($106.35 per day), are $5,317.50. From March 17, 2005, to August 1, 2005, a period of about four and one half months, the $389.31 per month differential between complainant's SD City Event salary and her earnings at TEG Staffing, Inc., amounts to $1,751.90.

Thus, SD City Event shall be ordered to pay complainant the sum of $7,069.40 as lost back pay. That sum will be awarded to complainant, plus interest thereon, at the rate of ten percent per year, compounded annually, from the effective date the earnings accrued until the date of payment.

2. Out-of-Pocket Damages of Health Coverage Costs

The DFEH asserts that complainant is entitled to reimbursement of the health coverage costs in the sum of $133.18 deducted from complainant's paycheck in two installments during her employment in the month of January 2005. The DFEH asserts that SD City Event did not pay the health insurance premiums and complainant received no health benefits as a result.

The DFEH did not establish that the $133.18 in health premiums paid by complainant was caused by the termination of complainant's employment or in retaliation for any protected activity. The evidence established that complainant's health insurance coverage was terminated in December 2004, at least two weeks prior to her initial report to Tanya Johnson and complainant's follow-up email about alleged preferential treatment, and about four weeks before the termination of her employment. Accordingly, no award of these requested out-of-pocket damages will be made.

3. Damages for Emotional Distress

The Commission has the authority to award actual damages for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses in an amount not to exceed, in combination with any administrative fines imposed, $150,000 per aggrieved person per respondent. (Gov. Code, § 12970, subd. (a) (3) and (a)(4).)

The evidence established that SD City Event's termination of complainant's employment caused complainant emotional distress. She testified that she felt "horrible," and an "emotional wreck." Complainant testified that her self-confidence was affected, and that she doubted her own abilities, as she reevaluated her own conduct, wondering if she was qualified to be a Human Resources Manager. Complainant also testified, however, to a mixed sense of relief that she was no longer working at SD City Event.

The financial stress resulting from her husband starting a new law practice is not imputed to SD City Event, and is not part of this award. And the record is not sufficient to determine that the Handevidts' bankruptcy, which Gregory Handevidt testified was filed several months after complainant found work at TEG Staffing, Inc., was a result of SD City Event's violation of the Act.

The record did establish that the emotional distress sustained by complainant as a result of the termination of her employment, considered in light of the factors set forth in Government Code section 12970, warrants an award of $35,000 against SD City Event. Thus, respondent SD City Event will be ordered to pay complainant that sum in actual damages for complainant's emotional distress. Interest will accrue on this amount, at the rate of ten percent per year from the effective date of this decision until the date of payment.

B. Administrative Fine

The DFEH also seeks an order awarding an administrative fine in the amount of $15,000. The Commission has the authority to order administrative fines pursuant to the Act where it finds, by clear and convincing evidence, a respondent "has been guilty of oppression, fraud, or malice, expressed or implied, as required by section 3294 of the Civil Code." (Gov. Code, § 12970, subd. (d).) In determining the appropriate amount of an administrative fine, the Commission shall consider relevant evidence of, including but not limited to, the following: willful, intentional, or purposeful conduct; refusal to prevent or eliminate discrimination; conscious disregard for the rights of the complainant; commission of unlawful conduct; intimidation or harassment; conduct without just cause or excuse, or multiple violations of the Act. (Gov. Code, § 12970, subd. (d).)

Here, the DFEH established its case against SD City Event in a setting where SD City Event did not put on a defense, other than to assert that the automatic stay was in effect. This is not a case where liability was established by clear and convincing evidence. Accordingly, no administrative fine will be ordered. (Civ. Code, § 3294; Gov. Code, § 12970, subd. (d).)

C. Affirmative Relief

The DFEH's accusation seeks a cease and desist order enjoining respondent SD City Event from engaging in further acts of retaliation in violation of the Act.

As the Chapter 7 Trustee Gregory Akers points out in his declaration filed in this matter, due to SD City Event's corporate status, it will not be receiving a discharge in the

bankruptcy proceedings. In these circumstances, further affirmative relief is appropriate under Government Code section 12970, subdivision (a), to ensure, in the event SD City Event resumes operations at any time, it shall be required to provide retaliation-prevention training for its supervisors and employees, as well as to post notices in the workplace about the prevention of retaliatory practices. Accordingly, the relief requested by the DFEH shall be granted.

ORDER

1. Respondent SD City Event, Inc., shall immediately cease and desist from retaliating against any employees because the employee opposes any practices forbidden under the FEHA or has filed a complaint, testified, or assisted in any proceeding brought under the FEHA.

2. Within 60 days of the effective date of this decision, respondent SD City Event, Inc., shall pay to complainant Annette Kay Handevidt actual damages for lost back pay accrued in the sum of $7,069.40, together with interest on this amount, at the rate of ten percent per year, compounded annually, from the date such wages would have accrued, until the date of payment.

3. Within 60 days of the effective date of this decision, respondents SD City Event, Inc., shall pay to complainant Annette Kay Handevidt actual damages for her emotional distress in the amount of $35,000, together with interest on this amount at the rate of ten percent per year, accruing from the effective date of this decision to the date of payment.

4. Within 60 days after the effective date of this decision, respondent SD City Event, Inc., shall provide training for all of its supervisors and employees about the prevention of retaliatory practices. Respondent SD City Event, Inc. shall secure advance approval from the Department of Fair Employment and Housing of the training provider, and the form and content of the training and shall provide written certification of its completion of the training to the Department and Commission.

5. Within 90 days after the effective date of this decision, respondent SD City Event, Inc., shall sign notices which conform to Attachments A and B of this decision and shall post clear and legible copies of these notices in a conspicuous place in the workplace. Posted copies of these notices shall not be reduced in size, defaced, altered, or covered by other material. The notice conforming to Attachment A shall be posted for a period of 90 working days. The copy conforming to Attachment B shall be posted permanently.

6. Within 100 days after the effective date of this decision, respondents SD City Event, Inc., shall, in writing, notify the Department of Fair Employment and Housing and the Commission of the nature of their compliance with this order. Respondents shall also notify

the Department of Fair Employment and Housing and Commission of any change of address and telephone number.

7. The accusation against respondents Tanya Johnson and Aaron Johnson as individuals is dismissed.

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523, Code of Civil Procedure section 1094.5 and California Code of Regulations, title 2, section 7437. Any petition for judicial review and related papers should be timely served on the Department of Fair Employment and Housing, Commission, respondent and complainant.

DATED: December 29, 2006

_____

Caroline L. Hunt
ADMINISTRATIVE LAW JUDGE

ATTACHMENT A

NOTICE TO ALL EMPLOYEES OF SD CITY EVENT, INC.

After hearing, the California Fair Employment and Housing Commission has found that SD City Event, Inc., has violated the Fair Employment and Housing Act. (Dept. Fair Empl. & Hous. v. SD City Event, Inc., et al (2007) No. 07-___.)

As a result of this decision, SD City Event, Inc., has been ordered to post this notice, and to take the following actions:

1. Cease and desist from retaliation.

2. Pay complainant back pay.

3. Pay a monetary award to the complainant for emotional distress.

4. Conduct training on retaliation prevention.

5. Post a statement of employees' rights and remedies under the Fair Employment and Housing Act.

DATED: _____ BY: _____
Authorized Agent of
SD City Event, Inc.

THIS NOTICE IS REQUIRED TO BE POSTED UNDER PENALTY OF LAW BY THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION. IT SHALL REMAIN POSTED FOR NINETY (90) CONSECUTIVE WORKING DAYS IN THIS LOCATION AND SHALL NOT BE ALTERED, REDUCED, OBSCURED, OR OTHERWISE TAMPERED WITH IN ANY WAY THAT HINDERS ITS VISIBILITY.

ATTACHMENT B

NOTICE TO ALL EMPLOYEES OF SD CITY EVENT, INC.

YOUR RIGHTS AND REMEDIES UNDER THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT

YOU HAVE THE RIGHT TO BE FREE FROM UNLAWFUL RETALIATION

The California Fair Employment and Housing Act prohibits retaliation against an employee for asserting their rights. Government Code section 12940, subdivision (h), makes it unlawful for an employer "to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding" brought under the FEHA.

YOU HAVE THE RIGHT TO COMPLAIN ABOUT RETALIATION AND GET RELIEF.

THE CALIFORNIA DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING investigates and prosecutes complaints of such retaliation in employment. If you think you have been retaliated against for asserting protected rights under the Fair Employment and Housing Act, you may file a complaint with the Department at:

Department of Fair Employment and Housing
1350 Front Street, Suite 3005
San Diego, CA 92101
(619) 645-2681 or (800) 884-1684

The Department will investigate your complaint. If the complaint has merit, the Department will attempt to resolve it. If no resolution is possible, the Department will prosecute the case with its own attorney before the Fair Employment and Housing Commission or in court. The Commission or court may order the retaliation stopped and can require your employer to reinstate you and to pay back wages, front pay and other out-of-pocket losses, damages for emotional injury, administrative fines, or punitive damages, and other appropriate relief.

DATED: _____ BY: _____
Authorized Agent of
SD City Event, Inc.

THIS NOTICE IS REQUIRED TO BE POSTED UNDER PENALTY OF LAW BY THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION. IT SHALL REMAIN PERMANENTLY POSTED IN THIS LOCATION AND SHALL NOT BE ALTERED, REDUCED, OBSCURED, OR OTHERWISE TAMPERED WITH IN ANY WAY THAT HINDERS ITS VISIBILITY.